No. 84240-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN C. GORDON AND CHARLES BUKOVSKY

Respondents.

ON APPEAL FROM DIVISION ONE OF
THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT JOHN GORDON

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. STATEMENT OF ISSUES ON REVIEW

1. Did Division One of the court of appeals correctly hold that the failure to inform the jury of the proper legal standard for determining whether the state had met its constitutionally mandated burden of proving the elements of the aggravating factors was manifest constitutional error which could be raised for the first time on appeal?

2. If the Court finds that the court of appeals was incorrect in holding that the failure to properly instruct the jury on the elements of the aggravating factors could be raised for the first time on appeal, should the case be remanded to the court of appeals in order to address Gordon's alternative argument, presented and briefed below, that counsel was ineffective in failing to propose instructions which would have provided the jury with the missing information?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Facts

Respondent John Gordon was charged with and convicted of second-degree felony murder predicated on assault. CP 665-66; RP ; RCW 9A.32.050(1)(b). The jury also rendered special verdicts that there were aggravating circumstances of "deliberate cruelty" and "particularly vulnerable victim." CP 970-71; RCW 9.94A.535(3)(a); RCW 9.94A.535(3)(b). An exceptional sentence of 366 months in custody was imposed and Gordon appealed. CP 1002-13, 1018-30; RP 2351.[1] On December 14, 2009, the court of appeals, Division One, reversed the

[1]Reference to the verbatim report of proceedings is explained in Appendix A to appellant's opening brief on appeal.

exceptional sentence but otherwise affirmed.[2] Gordon's Petition for Review was denied but a Petition filed by the prosecution was granted.

2. Overview of relevant facts

The decision of the court of appeals sets forth the facts of the underlying offense, which involved an incident where there was a fight and Brian Lewis ended up dead after being beaten by multiple people. RP 997-1002; State v. Gordon, 153 Wn. App. 519, 521-22, 223 P.3d 519 (2009), review granted, __ Wn.2d __ (2010). Gordon and Bukovsky were convicted of second-degree felony murder based on an assault predicate. CP 964-67, 971. The jury was also asked whether the crime had been committed with "deliberate cruelty" and whether Lewis was "particularly vulnerable," and answered "yes" for both aggravators. RP 2146; CP 964-67, 971. An exceptional sentence was later imposed based upon those aggravators.[3]

The instructions for the aggravators told jurors only that the state had to prove beyond a reasonable doubt "that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim" (Instruction 32) and "that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance" (Instruction 33). CP 960-61.

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[2]The case was originally filed in Division Two but transferred to Division One because of caseload issues.

[3]In imposing an exceptional sentence, the trial court not only relied on the jury's findings but also made its own factual findings, citing "evidence" that it felt supported its findings regarding "deliberate cruelty" and "particular vulnerability." The Court of Appeals agreed with Gordon that the trial court's act of making and relying on findings of its own was in error. Gordon, 153 Wn. App. at 539.

On appeal, Gordon argued that those instructions were constitutionally deficient under both due process and Gordon's rights to trial by jury because they failed to properly convey to the jury the prosecution's burden of proof on those factors. Brief of Appellant Gordon ("BOA") at 35-43. Further, he argued, the errors were not "harmless" because the instructions relieved the prosecution of its burden of proof for the aggravating factors, the aggravating factors did not apply as a matter of law and they were not supported by "overwhelming" evidence as required for the instructional errors to be deemed "harmless." BOA at 43-54. Finally, he argued that, if the court accepted the expected argument of the prosecution that the failure to advise the jury of the prosecutor's burden of proof was "nothing more than a failure to define an element," reversal was still required because counsel was prejudicially ineffective in failing to propose proper instructions on the aggravating factors. BOA at 54-57.

Division One agreed that the instructions were constitutionally deficient. 153 Wn. App. at 529-39. More specifically, the Court held, the instructions "lacked any articulation of the specific elements of each factors." 153 Wn. App. at 529. Because the factors each have specific requirements for their proof which are "not concomitant with either a statutory definition or a commonsense meaning of the terms," the Court held, and because the instructions failed to set forth the "legal standard of a statutory aggravating factor," that was a manifest error affecting a constitutional right that may be raised for the first time on appeal. 153

Wn. App. at 529-39.

The error in this case was also found to be "patently obvious on the record," because it had the practical and identifiable consequences of leaving the jury "to deliberate with a misleading and incomplete statement of the law." 153 Wn. App. at 535. Further, it was not constitutionally harmless to fail to provide sufficient instruction on either factor, the Court held, because the instructions did not inform the jury of the applicable law and it was "impossible to conclude, beyond a reasonable doubt, that the jury would have reached the same conclusion had its deliberations" been properly framed by the instructions. 153 Wn. App. at 535-37.

Further, Division One soundly rejected the prosecution's efforts to characterize the issue as simply one involving further "definition" of an element. 153 Wn. App. at 531-32.

In its Petition for Review, the prosecution raised only a single assignment of error in relation to Gordon: whether the court of appeals had erred in addressing the instructional errors for the first time on appeal because Gordon's counsel failed to object to the instructions below. Petition, at 2.[4] These pleadings follow.

D. SUPPLEMENTAL ARGUMENT

THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS OF THE AGGRAVATING FACTORS WAS MANIFEST CONSTITUTIONAL ERROR AND DIVISION ONE'S DECISION SHOULD BE AFFIRMED

Due process requires that the prosecution bear the burden of

[4]Gordon's Petition for Review was denied.

proving all the essential elements of the charges, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is now clear that aggravating factors used to impose a sentence above the standard range are functionally "elements" of the aggravated version of the crime. See, Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2007). As a result, not only due process but also the state and federal rights to trial by jury mandate that the state prove factually- based aggravating factors to the jury, beyond a reasonable doubt. See, e.g., Apprendi, 530 U.S. at 490; Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

As a result, any instructions on the aggravating factors will not be constitutionally adequate unless they properly convey to the jury the state's constitutionally mandated burden of proof. See e.g., State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In addition, instructions must, when taken as a whole, make the applicable legal standards "manifestly apparent to the average juror." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

In this case, the jury instructions on the aggravating factors failed to inform the jury of the relevant legal standard it was required to apply in order to determine whether the state had met its burden of proving that a fact amounts to an "aggravating factor." A fact does not meet that

standard unless it is sufficiently "substantial and compelling" to distinguish the particular crime from others in the same category. State v. Cardenas, 129 Wn.2d 1, 8-9, 914 P.2d 57 (1996). Further, a fact does not meet that standard if it is something which was necessarily considered in computing the presumptive range for the offense. See State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

Put another way, to amount to an aggravating factor, conduct must not simply be greater than required in order to commit the *minimum* version of the charged crime. See State v. Bourgeois, 72 Wn. App. 650, 652-53, 866 P.2d 43 (1994). Instead, it must be so much more egregious that it exceeds that which is typical for the average crime of the same category, distinguishing the crime significantly from others. See Grewe, 117 Wn.2d at 218. Thus, in Cardenas, although there were multiple, severe injuries, an exceptional sentence could not be upheld on those grounds because such injuries were "often" the result of the crime and did not "distinguish the crime from the typical vehicular assault." 129 Wn.2d at 6-9. In addition, the fact that the defendant was "reckless and drunk" when he committed the crime did not support the sentence, because there was no finding that the recklessness and drunkenness was somehow atypical of the usual conduct of the crime. 129 Wn.2d at 9-10.

For the relevant aggravating factors relied on in this case, courts have further clarified the legal requirements of proof. For the "deliberate cruelty" aggravating factor, there must be significant violence "not usually associated with the commission of the offense in question" or "gratuitous

violence or other conduct which inflicts physical, psychological, or emotional pain *as an end in itself."* State v. Ferguson, 142 Wn.2d 631, 645, 15 P.3d 1271 (2001) (emphasis added); see State v. Strauss, 54 Wn. App. 408, 418, 773 P.2d 898 (1989). For the "particular vulnerability /incapable of resistance" factor, the victim must not simply have the typical vulnerability common to all crime victims but must in fact be unusually, particularly vulnerable or incapable of resistance. See State v. Ramires, 109 Wn. App. 749, 765, 37 P.3d 343, review denied, 125 Wn.2d 1021 (2002). Further, the particular vulnerability or incapability must be a significant factor in the commission of the crime, such as when a person is selected as a victim *because* of that vulnerability or incapability. See State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006); State v. Vermillion, 66 Wn. App. 332, 349, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993).

In the past, when judges made the relevant factual findings in support of exceptional sentences, courts reasonably assumed that the sentencing judge would understand the legal standards for finding an aggravating factor. Judges were expected to be able to compare similar crimes, based upon their experience and knowledge, and reach reasoned decisions about whether the facts of the case were significantly more egregious than the average crime of the same type or contemplated conduct not considered by the Legislature in setting the presumptive range. See, e.g., State v. Solberg, 122 Wn.2d 688, 707, 861 P.2d 460 (1993).

Those assumptions, however, no longer hold true. Not only is there a far higher standard of proof for aggravating facts (i.e. beyond a reasonable doubt rather than by a preponderance), but judges no longer make those kinds of factual findings. Juries do.

As a result, in order to ensure that a jury applies the relevant legal standard and holds the state to its true burden of proving an aggravating fact beyond a reasonable doubt, the jury must now be properly instructed on that burden in order to make it - and the relevant legal standards the jury was required to apply - "manifestly apparent." See, e.g., State v. Stubbs, 144 Wn. App. 644, 648, 184 P.3d 660 (2008), affirmed, __ Wn. 2d __ (2010 WL 3911343) (jury was instructed it had to find that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of Assault in the First Degree").

The instructions in this case failed to meet those requirements. For the special verdicts, the instructions simply told the jury that the state had to prove beyond a reasonable doubt "that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim" (Instruction 32) and "that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance" (Instruction 33). CP 960-61. And the special verdict forms merely asked the jury to answer "yes" or "no" to those questions. CP 967. Aside from that, the jury was given *no* instructions on the relevant legal standards it had to apply in order to decide whether the state had met its burden of proving the aggravating factors. The jury

was not told that the "deliberate cruelty" aggravating factor was not proven unless the cruelty was significantly more egregious than typical for the offense and involved "gratuitous violence" or other conduct which inflicted physical, psychological or emotional pain as an end in itself. CP 925-67. Nor was the jury instructed that it could not find the aggravating factor that Lewis was particularly "vulnerable" or incapable of resistance under the law unless they found he was significantly more vulnerable or incapable of resistance to the offense than usual for the crime. CP 925-67. And the jury was not told that the vulnerability and incapability not only had to be known by Gordon but also had to be a significant reason for the commission of the crime, as required. CP 925-67; see, e.g., Suleiman, 158 Wn.2d at 293.

Thus, the jury was left without any information as to the relevant legal standards it was required to apply in order to decide whether the state had met its constitutionally mandated burden. They were given no instruction as to how to make the required determination, nor were they informed that the normal violence, vulnerability or incapability was insufficient. And they were not informed that they "necessarily" had to conduct a "factual comparison" to other, similar cases in order to find the conduct, vulnerability or incapability here far more egregious than typical, in order to find for the state. See Suleiman, 158 Wn.2d at 293, 294 n. 5.

Without such instruction, the jury was not properly informed of the state's constitutionally mandated burden of proof.

Several U.S. Supreme Court cases are instructive. In Maynard v.

Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the aggravating circumstance supporting imposition of the death penalty was that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 364-65. This language was insufficiently specific to properly instruct the jury that it could not find the aggravating factor unless it found the case significantly distinct from other murders:

> To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, *and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."*

486 U.S. at 363-64 (emphasis added).

Similarly, in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman." This language was also insufficient to inform the jury about the need for a distinction between the ordinary case and one in which the highest penalty should be imposed:

> There is nothing in these few words [of outrageously or wantonly vile, horrible or inhuman] standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. *A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'* Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

446 U.S. at 428-29 (emphasis added; footnote omitted). As a result, because the jury was given "no guidance" about how to make its determination of when the crime at issue met the required standards, the Court reversed. Id.

Likewise, here, a person of ordinary sensibility could reasonably

believe that *anytime* someone hit and "stomped" another person with such force that the result was death, that was deliberately cruel. Indeed, such a person could easily find that hitting or kicking another person for *any* reason was cruel, or that continuing to do so after a person had a bloody nose or appeared hurt met that standard. And a person of ordinary sensibility would likely believe that *any* crime victim was vulnerable when they were hurt or outnumbered, not understanding that particular vulnerability or incapability of resistance required specific proof not only of greater vulnerability or incapability than the average victim but also that the vulnerability or incapability had to be a significant reason the crime occurred in the first place.

In its Response below and in its Petition to this Court, the prosecution has not claimed that the cursory instructions given in this case somehow explained the specifics for when there is "deliberate cruelty" and when the victim is "particularly vulnerable" to the jury. Petition at 1-12; Brief of Respondent ("BOR" at 44-48). Nor has it ever addressed Godfrey or Cartwright, despite their obvious applicability to the issues presented in this case. Petition at 1-12; BOR at 1-56.

Instead, the prosecution attempts to avoid the issue by characterizing those standards as nothing more than "definitional" so that the failure to provide sufficient instruction can be deemed "nonconstitutional." Petition at 1-12. The jury was not required to be informed of "the relevant legal standards," the prosecution declaims, because "[i]t would seem that Gordon is raising a claim regarding

definitional instructions which may not be raised for the first time on appeal." BOR at 47. Below, the prosecution's arguments depended upon its claim that the aggravating factors were not "elements" of a higher crime upon which the jury had to be properly instructed, a claim it says this Court's decisions support. BOR at 46-47, quoting, State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008). In its Petition, the prosecution maintains this position but declares that the issue is "ultimately, irrelevant" because even if an aggravating factor is an "element" the failure to "define a term used in an element" cannot be raised for the first time on appeal. Petition at 11.

The first problem with the prosecution's claim is that it misconstrues Roswell. In that case, this Court specifically declared that an aggravating factor, while not an element of the underlying crime, "must be proved to the trier of fact as if it were an element." 165 Wn.2d at 194. And this Court has made the same point in other cases. See, State v. Powell, 167 Wn.2d 672, 684, 223 P.3d 493 (2009) ("functional equivalent" of an element); State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005) (same). Further, the reason for this is that "the core crime and the aggravating fact together constitute an aggravated crime. . . [and] [t]he aggravating fact is an element of the aggravating crime," so that [e]ach fact necessary for that entitlement is an element." Apprendi, 530 U.S. at 501-502 (Thomas, J., concurring). As the Ring Court declared, facts which are necessary to impose a greater sentence are "the functional equivalent of an element of a greater offense." 536 U.S. at 609.

In addition to misstating and misunderstanding the holdings of this Court and the U.S. Supreme Court in this regard, the prosecution's argument mistakes them in another way by assuming that the "elements" required to prove the aggravating factors are the name of the aggravating factors themselves, i.e., that it occurred with "deliberate cruelty" and that the victim was "particularly vulnerable." But Ring made it clear that the elements required to be proved are instead the *facts* necessary to impose the greater sentence, regardless what they are called. In Ring, the Court specifically overruled Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), which had held that additional facts found by the judge were merely "sentencing considerations." Ring, 536 U.S. at 589. The Ring Court overruled Walton because "[c]apital defendants, no less than noncapital defendants. . . are entitled to a jury determination *of any fact* on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589. Indeed, in Apprendi, Justice Scalia reached a similar conclusion, declaring, "all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." 536 U.S. at 602.

The state does not dispute that, in order to legally prove that the aggravating factor of "deliberate cruelty" to apply, it had to show "gratuitous violence or other conduct which inflicts physical, psychological or emotional pain as an end in itself," that the conduct must be "more serious than typical," and that it is "behavior that is not usually associated with simply committing the crime" - indeed, the prosecution

concedes that point. See BOR at 42 (quotations omitted). The prosecution further concedes that, in order to meet the legal requirements of proving "particular vulnerability," it had to prove that the defendant knew or should have known that the victim was "particularly vulnerable or incapable of resistance" as compared with other victims, although the prosecution did not, in its briefing to date, address this Court's mandate that the particular vulnerability also had to be a significant reason for the commission of the crime. See BOR at 41; see Suleiman, 158 Wn.2d at 293. Nothing in the instructions given made those applicable legal standards "manifestly apparent to the average juror." See Walden, 131 Wn.2d at 473. The prosecution has not - and cannot, with any credibility - claim otherwise. Its declaration that the jury was "properly informed of the components or 'elements' of the aggravating circumstances" is thus simply without merit. See Petition at 11.

A further problem with the prosecution's argument is that it misses the distinction between providing further definition when the jury is sufficiently instructed and providing, in the first instance, instruction on the relevant legal standards the jury must apply in order to decide whether the state has met its constitutionally mandated burden of proof. The cases upon which the prosecution relies actually make this point. In Ng, for example, this Court relied on the decision in State v. Pawling, 23 Wn. App. 226, 59 P.2d 1367, review denied, 92 Wn.2d 1035 (1979), in which the defendant was charged with burglary for committing an assault in a dwelling, and the jury was not given a definition of "assault." See State v.

Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988); Petition at 11. The Pawling court said that the element of assault was already included in the instruction and that there was "no necessity" to further define it, because "an understanding of its meaning can fairly be imputed to laymen." 23 Wn. App. at 232-33. Ng similarly found no error in the instructions for the elements of first degree robbery and the failure to further define "theft," an element of that crime, because "'[t]heft' like 'assault' is a term of sufficient common understanding to allow the jury" to make its decision without further instruction. Ng, 110 Wn.2d at 44-45.

Here, we are not dealing with terms of "sufficient common understanding" that a jury could be assumed to know their meaning. Instead, as the court of appeals pointed out, this Court and other courts have found that the terms in question are technical and have a meaning unique in the law which jurors could not be expected to understand by the mere words themselves. Gordon, 153 Wn. App. at 536-37.

Notably, in reaching its conclusion, the Ng Court specifically distinguished cases where the jury was not given sufficient instruction on the elements it had to find in the first place. Id. Those cases establish the importance of ensuring that, if elements do not have a common meaning, jurors can be seriously misled by failing to provide them with adequate information to understand what they are required to find. See, e.g., State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); State v. Davis, 27 Wn. App. 498, 618 P.2d 1034 (1980), overruled in part on other grounds by State v. Riker, 123 Wn.2d 351, 366 n. 6, 869 P.2d 43 (1994). As the

Davis Court declared, "[i]t cannot be said that a defendant had a fair trial if the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven" based on the instructions given. 27 Wn. App. at 506.

Here, there can be no question that the aggravating factors have such meaning. The failure to provide the jury with sufficient instruction to enable them to properly decide if the state had met its burden of proving all the essential elements of the aggravating factors was manifest constitutional error, as the court of appeals properly held. The prosecution's arguments to the contrary do not withstand scrutiny.

Notably, the prosecution did not assign error in its Petition to the decision of the court of appeals that the instructional errors were not "harmless" under the constitutional harmless error standard. See Petition at 1-17. Instead, the only question the state presented was whether the court of appeals erred in finding the instructional errors "manifest" and in addressing them for the first time on appeal, not in Division One's conclusion that those errors were not harmless and thus compelled reversal. Petition at 1-17. Thus, if this Court agrees that the issues could be raised for the first time on appeal, the inquiry is at an end, as the state did not ask this Court to review the separate determination that the errors were not harmless. See RAP 13.7(b); State v. Schaffer, 120 Wn.2d 616, 619 n. 1, 845 P.2d 281 (1993).

Finally, even if this Court were somehow to agree that the failure

to inform the jury of the applicable legal requirements for the state to prove the aggravating factors was not manifest constitutional error, that would not automatically result in affirmance, as the prosecution appears to suggest. Gordon also raised an alternative argument that counsel was prejudicially ineffective in failing to propose proper instructions on the aggravators. BOA at 54-58. He noted the caselaw establishing that counsel is ineffective when he fails to propose an instruction consistent with placing the proper burden of proof on the state. See State v. Carter, 127 Wn. App. 713, 715, 112 P.3d 56 (2005). Further, he noted that such unprofessional conduct is presumed prejudicial and cannot be deemed a legitimate trial strategy. See id. Thus, in Carter, where counsel proposed an instruction which improperly stated the prosecution's burden despite caselaw establishing that burden from a few years earlier, reversal was required. 127 Wn. App. at 715-717. Similarly, here, while Blakely and its progeny were only a few years old, no reasonably competent defense attorney could have failed to be aware of the significant changes they wrought. And the cases establishing the prosecution's burden for proving the aggravating factors even under the old, lesser standard of proof by a preponderance had been well-settled long before this trial. See, e.g., Vermillion, 66 Wn. App. at 349; Strauss, 54 Wn. App. at 418.

Indeed, counsel was himself clearly aware of the caselaw, at least with regard to the "particular vulnerability" factor, because he referred to it at least in general in asking for dismissal of that aggravator. RP 2146. Yet counsel exerted no effort to have the jury properly informed of the

standards the state had to meet in order to meet its burden on those aggravators.

In its decision, the court of appeals declared that it was not reaching the issue of ineffective assistance Gordon had raised, because it was reversing based on the instructional issue. Gordon, 153 Wn. App. At 539 n. 15. Should this Court find that the requirements of proof for the aggravating factors were simply "definitional," it should remand the case to the court of appeals for further consideration on the issue of whether counsel was prejudicially ineffective in failing to provide proper instructions.

E. CONCLUSION

The court of appeals properly decided the issues presented on review in this case and this court should so hold. The failure to instruct the jury on the proper legal standards required for the aggravating factors was manifest constitutional error and was properly addressed on appeal. In the alternative, even if the issue did not meet the manifest constitutional error standard, the proper remedy is to remand to the court of appeals for consideration of Gordon's argument that counsel was prejudicially ineffective in failing to propose proper instructions.

DATED this 28th day of October, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel, appellant, and the codefendant in the consolidated case by and through his counsel, by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

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to Mr. Gordon Bukovsky, c/o his appellate counsel, via email, kochd@nwattorney.net.

DATED this 29th day of October, 2010.

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